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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

INDEPENDENT INK, INC.,

Cross-Petitioner,

v.

ILLINOIS TOOL WORKS INC., *et al.*,

Cross-Respondents.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CONDITIONAL CROSS-PETITION

EDWARD F. O'CONNOR
O'CONNOR CHRISTENSEN
& MCLAUGHLIN LLP
1920 Main Street, Suite 150
Irvine, CA 92614
(949) 851-5000

Counsel for Cross-Petitioner

194252

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Whether the Federal Circuit was correct in affirming the dismissal of Plaintiff's causes of action relating to antitrust conduct, other than straight patent tying, because Plaintiff failed to designate a geographic market.

Whether, under the uncontroverted facts presented, the court should have concluded that Defendants has absolute market power in the patented printhead market, because the Defendants were the only source of supply for printing machines which utilized Defendants' patented printhead technology. The Court therefore should have directed that summary judgment be awarded in favor of Plaintiff without further proceedings.

Whether, under *International Salt Co. v. United States*, 332 U.S. 392 (1947), the presumption of market power in the patented products should be irrebuttable.

STATEMENT PURSUANT TO RULE 29.6

Cross-Petitioner, Independent Ink, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

Cross-Petitioner, Independent Ink, conditionally cross-petitions for writ of certiorari to review the judgment of the Court of Appeals for the Federal Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals for the Federal Circuit is included in the appendix to the petition for writ of certiorari filed by Trident and Illinois Tool Works.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a) and Rule 12.5 of the Rules of the Supreme Court and is conditional upon this Court's grant of Petitioners' petition for writ of certiorari.

STATEMENT OF THE CASE

Factual Background. Defendants have a perfect storm of a patent tying monopoly. In addition to the facts set forth by Trident and Illinois Tool Works in their petition, it was uncontroverted that the patented piezoelectric printheads sold by Defendants to manufacturers of printing machines using Defendants' printheads, are manufactured and sold only by Defendants. There are no other suppliers of printheads that will work in those printing machines. It is also undisputed that Defendants' printheads are not used in any equipment other than machines manufactured by Defendants' customers. The ink, which is the tied product, is only useable in machines using Defendants' patented printheads.

Plaintiff also introduced a declaration that Plaintiff and Defendants conduct their business nationwide. Illinois Tool Works is a Fortune 500 company. The printheads are manufactured by Defendants, and sold to original equipment manufacturers ("OEMs") across the country. The consumers of ink and machines are national companies such as General Mills. The appendix is full of documents of Defendants showing their national sales and national market shares. Since Defendants are the only U.S. manufacturer of printheads that will work in the OEM's machines, they clearly have a national monopoly. There is, at least, an issue of fact as to whether Defendants had a national monopoly. Defendants' internal records, which are in the appendix filed with this case in the Court of Appeals for the Federal Circuit, show Defendants' monopoly share, nationwide, of the unique ink used in the unique machines in this case.

Procedural History. The lower court entered summary judgment against Plaintiff on its claims relating to actual monopolization, attempted monopolization and conspiracy. The Court of Appeals for the Federal Circuit affirmed solely on the basis of lack of geographic market. The Court of Appeals for the Federal Circuit also held that the presentation of patent market power was rebuttable.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

1) In *International Salt Co. v. United States*, 332 U.S. 392 (1947), the Supreme Court affirmed the granting of summary judgment in favor of Plaintiff Justice Department, solely on the basis of the patent monopoly. The basis, as repeated in numerous decisions, is not only a presumption based on the patent monopoly, but also on the basis that it would be an impermissible extension of the patent monopoly to allow a patent to restrict the sale of non-patented products. This Court has never, as acknowledged by the Court of Appeals for the Federal Circuit, held that the patent market power presumption is rebuttable.

2) It is uncontroverted that there are no substitutes for the patented printheads. Under those facts, it was error for the Court of Appeals for the Federal Circuit to remand this case to allow Defendants another opportunity to find a way around their illegal conduct.

3) The Court of Appeals for the Federal Circuit ignored the plethora of evidence on Plaintiff's other antitrust causes of action and held there was no geographic market designation. Plaintiff submitted an uncontradicted declaration that Plaintiff and Defendants conduct the relevant ink business on a nationwide basis. The Court should also take judicial notice that ITW is a national Fortune 500 company. The appendix is filled with evidence of Defendants' nationwide monopoly share of the ink, the printheads, and the entire piezoelectric market.

CONCLUSION

Plaintiff opposes Defendants' petition for writ of certiorari. Should the Court grant Defendants' petition, then it should address the mistakes made by the Court of Appeals for the Federal Circuit as identified herein.

Respectfully submitted,

EDWARD F. O'CONNOR
O'CONNOR CHRISTENSEN
& MCLAUGHLIN LLP
1920 Main Street, Suite 150
Irvine, CA 92614
(949) 851-5000

Counsel for Cross-Petitioner

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On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR CROSS-RESPONDENTS IN OPPOSITION

RICHARD J. FAVRETTO
ANDREW J. PINCUS
Counsel of Record
CHRISTOPHER J. KELLY
NICKOLAI G. LEVIN
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000

Counsel for Cross-Respondents

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Whether the court of appeals correctly affirmed summary judgment on cross-petitioner's theory of antitrust liability under Section 2 of the Sherman Act (15 U.S.C. § 2) on the basis of the district court's finding that cross-petitioner failed to establish a geographic market.

2. Whether the court of appeals erred in remanding the case to allow the district court to apply the new legal standard announced by the court of appeals to the facts of this case, rather than applying that standard itself.

3. Whether the presumption of market power in patent tying cases is irrebutable.

RULE 29.6 STATEMENT AND PARTIES TO THE PROCEEDING

Pursuant to this Court's Rule 29.6, petitioners state that Trident, Inc. was acquired by Illinois Tool Works Inc. on February 17, 1999. Thereafter, Trident, Inc. became a division of ITW, and is no longer a separate corporate entity. Illinois Tool Works Inc. is a publicly held corporation.

The parties to the proceeding in the court of appeals were Illinois Tool Works Inc., Trident, Inc., and Independent Ink, Inc.

BRIEF FOR CROSS-RESPONDENTS IN OPPOSITION

Cross-Petitioner Independent Ink, Inc.'s three-paragraph conclusory argument does not come close to articulating a cognizable reason for granting its conditional cross-petition. The conditional cross-petition therefore should be denied.

Two of the questions presented in the conditional cross-petition are entirely fact-bound. Independent Ink first seeks review of the district court's determination, upheld by the court of appeals, that its theory of antitrust liability under Section 2 of the Sherman Act (15 U.S.C. § 2) was deficient because Independent Ink failed to present sufficient evidence defining a geographic market. 04-1329 Pet. App. 18a, 52a. This Court has consistently recognized that "'[a] court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.'" *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 841 (1996) (quoting *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949)). Independent Ink has not even attempted to make such a showing here, let alone explain why such a factual issue is sufficiently important to warrant this Court's attention. Review plainly is not warranted on this ground. Cf. *NLRB v. Hendricks County Rural Elec. Corp.*, 454 U.S. 170, 176 n.8 (1981) (improvident grant of cross-petition that presented "primarily a question of fact," "which does not merit Court review").

Second, Independent Ink asserts that the court of appeals itself should have applied to the facts of this case its standard for rebutting the market power presumption rather than remanding to allow the district court to make that determination in the first instance. To begin with, Independent Ink's contention rests on the erroneous claim that it is "uncontro-

verted that there are no substitutes for the patented printhead" (04-1501 Pet. 3); in fact, the district court expressly found there are competing substitutes for the patented printhead (04-1329 Pet. App. 22a, 35a-36a), a finding that the court of appeals did not disturb (*id.* 16a).

More fundamentally, the court of appeals' approach is entirely appropriate: this Court frequently directs lower courts to apply in the first instance a newly announced legal standard. See, *e.g.*, *Johnson v. California*, 125 S. Ct. 1141, 1152 (Mar. 30, 2005) (citing cases). There accordingly is no warrant for review of this wholly case-specific issue by this Court.

The final question raised in the conditional cross-petition is whether the Federal Circuit erred in holding that the market power presumption is rebuttable. Independent Ink contends that the presumption is irrebuttable, but presents no reasons at all why review of that issue is warranted other than the fact that this Court has never expressly stated that the presumption is rebuttable. Although there is some disagreement among the courts of appeals with respect to the particulars of how the presumption may be rebutted, no court of appeals has squarely held that the presumption is irrebuttable. See 04-1329 Pet. 24. Nor, contrary to Independent Ink's intimation, does *International Salt Co. v. United States*, 332 U.S. 392 (1947), so hold. There, although the Court presumed the necessary degree of market power from the patent, it never held that the presumption was "irrebutable." Rather, as the Court later explained, *International Salt* viewed a patent as "at least *prima facie* evidence of [market] control." *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 307 (1949); see also 10 P. Areeda et al., *Antitrust Law* ¶¶ 1737b, 1737c, at 80-83 (2d ed. 2004) (describing ambiguities in *International Salt's* holding). The court of appeals' determination that the presumption is rebuttable presents no cause for review.

It is therefore respectfully submitted that the conditional cross-petition should be denied.

RICHARD J. FAVRETTO
ANDREW J. PINCUS
Counsel of Record
CHRISTOPHER J. KELLY
NICKOLAI G. LEVIN
Mayer, Brown, Rowe
& Maw LLP
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000

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